82-1013

No. .....

IN THE

Supreme Court of the United States

October Term, 1982

DOMINIC PHILLIP BROOKLIER and SAMUEL ORLANDO SCIORTINO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Appeal from the United States Court of Appeal for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI.

DONALD B. MARKS,
9171 Wilshire Blvd.,
Suite 615,
Beverly Hills, Calif. 90210,
(213) 273-7166,
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

(1) Whether the United States Court of Appeals for the Ninth Circuit erred in its finding that the Double Jeopardy Clause of the Fifth Amendment had not been violated where petitioners were prosecuted by the Federal Government for conspiracy to commit an extortion in 1974 and, thereafter, successively prosecuted in 1980 by the Federal Government for substantively committing the same extortion?

(2) Was the petitioners' 1975 plea agreement with the government violated under *Santobello v. New York*?

(3) Does the prosecutor's closing argument, which conceded that petitioners were not involved in the Forex extortions, require reversal on the basis of insufficiency of evidence?

(4) Does federal jurisdiction under the Hobbs Act exist where no actual or potential effect on interstate commerce can be shown?

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OPINION REFERENCE.

United States Court of Appeals for the Ninth Circuit. Opinion filed on September 3, 1982 in Case Nos. 81-1045 and 81-1046 (a copy of which is included in the Appendix hereto).

JURISDICTION.

The United States District Court for the Central District of California had jurisdiction in this cause by virtue of Title 18, United States Code, Section 1962(c); Rule 18 of the Federal Rules of Criminal Procedure.

The United States Court of Appeals for the Ninth Circuit had jurisdiction under Title 28, United States Code, Sections 1291 and 1294(1), Rule 37(a) of the Federal Rules of Criminal Procedure.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

Fifth Amendment to United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service and time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18, United States Code, Sections, 1961, 1962, and 1963 (as set out in the Appendix hereto).

STATEMENT OF THE CASE.

A. "Double Jeopardy.

On July 9, 1974, in the Central District of California, the petitioners, DOMINIC PHILLIP BROOKLIER (hereinafter referred to as "BROOKLIER") and SAMUEL ORLANDO SCIORTINO (hereinafter referred to as "SCIORTINO"), were named in a seven count indictment charging them and others with conspiracy to violate the federal racketeering statute (RICO), extortion, fraud, and aiding and abetting. Count One of that indictment, more specifically, charged BROOKLIER and SCIORTINO with conspiracy through a pattern of racketeering activity to engage in the activities of an enterprise which affected interstate commerce to extort and illegally collect money, property, and gambling debts from persons engaged in legitimate and illegitimate enterprises in violation of Title 18, U.S.C. § 1962(d). Among the charged "acts of racketeering" set out in Count One, was the planning and commission of the extortion of a Los

Angeles bookmaker by the name of Sam Farkas. On April 9, 1975, BROOKLIER and SCIORTINO, after substantial negotiations with the government, entered pleas of guilty to Count One of the indictment and the remaining counts were dismissed. BROOKLIER and SCIORTINO were sentenced to prison terms and have, in fact, served their sentences.

On February 20, 1979, BROOKLIER and SCIORTINO, and three others, were named in a five count indictment, which included a substantive RICO count. Count Two of said indictment alleged seven acts of racketeering activity, including the same Farkas extortion which BROOKLIER and SCIORTINO were previously convicted of conspiring to commit by their plea of guilty on April 9, 1975. On March 19, 1979, petitioners filed a motion to dismiss Count Two as violative of the 1975 plea agreement and the Double Jeopardy Clause of the Fifth Amendment. Following the filing of the government's response and oral argument, the Honorable Harry Pregerson denied the petitioners' motion on October 18, 1979. On October 26, 1979, petitioners, pursuant to Title 28, United States Code, Section 1291, and the authority of *Abney v. United States*, 431 U.S. 651 (1977), filed an interlocutory appeal from the denial of their motion.

On March 18, 1980, prior to the date set for oral argument before the Ninth Circuit, the indictment underlying Count Two of the indictment was dismissed without prejudice due to grand jury irregularities. Thereafter, on April 21, 1980, the interlocutory appeal then pending before the Ninth Circuit (No. 79-1680) was remanded to the District Court and subsequently dismissed.

Petitioners were reindicted May 15, 1980, with the indictment reading exactly as the indictment previously dismissed. On June 17, 1980, petitioners filed their motion to

dismiss Count Two of the indictment on Double Jeopardy and breach of plea bargain grounds. The District Court denied petitioners' motion on June 30, 1980.

On July 9, 1980, petitioners filed their interlocutory notice of appeal in response to the June 30, 1980, denial of their Double Jeopardy dismissal motion relating to Count Two of the indictment before the District Court. On August 1, 1980, the government filed its "Motion to Expedite Oral Argument Date and Ruling", inasmuch as the trial on the merits of this matter was scheduled to commence on September 16, 1980. On August 21, 1980, the Ninth Circuit Court of Appeals granted the government's motion and set forth an expedited briefing schedule.

On September 8, 1980, the United States Court of Appeals for the Ninth Circuit issued its order in Case No. 80-1455, affirming the judgment of the District Court. A copy of said order is set forth in the Appendix hereto.

On September 22, 1980, petitioners filed their Petition for Rehearing and Suggestion for Rehearing En Banc with the United States Court of Appeals for the Ninth Circuit.

On September 25, 1980, the petition for rehearing was denied by the Ninth Circuit and the mandate was issued. On October 16, 1980, a Ninth Circuit panel voted to reject the Suggestion for a Rehearing En Banc.

Trial on the underlying indictment commenced on September 30, 1980. On November 14, 1980, verdicts were returned. Both petitioners BROOKLIER and SCIORTINO were convicted on Count Two of the indictment which alleged the Farkas extortion as an act of racketeering. Petitioners were acquitted of Count Three of the indictment (extortion of Theodore Gaswirth in violation of 18 USC 1951) and Count Five of the indictment (obstruction of justice stemming from the killing of Frank Bompensiero in

violation of 18 U.S.C. 1510). On January 20, 1981, petitioner BROOKLIER was sentenced to serve four years on Counts One and Two, with said sentences to run concurrently. On January 20, 1981, petitioner SCIORTINO was sentenced to serve a four year term of imprisonment as a result of his conviction on Count Two.

On January 23, 1981, the Ninth Circuit filed its written opinion regarding the Double Jeopardy issue raised by petitioners' interlocutory appeal. A copy of the opinion is contained in the Appendix hereto and is reported at 637 F.2d 620 (9th Cir. 1980). BROOKLIER and SCIORTINO thereafter filed a Petition for Writ of Certiorari raising the Double Jeopardy issue. Said petition was assigned Supreme Court Docket No. 80-921. The Solicitor General filed a "Memorandum for the United States in Opposition" and argued that review of petitioners' Double Jeopardy claim at that time would be inappropriate. The Solicitor General argued as follows:

> "4. Review of petitioners' double-jeopardy claim would be inappropriate at this stage. The instant petition arises from the denial of a pretrial motion to dismiss Count II of the 1979 indictment, not from a final judgment of conviction. Although the district court's order denying the motion to dismiss was immediately appealable because petitioners invoked the protection of the Double Jeopardy Clause 'against being twice put to *trial* for the same offense' (*Abney v. United States, supra*, 431 U.S. at 661), that rationale is no longer applicable in this case. Since the time their *Abney* appeal was filed and resolved against them by the court of appeals, petitioners have been tried, convicted, and sentenced. Accordingly, the *Abney* analysis allowing a pretrial appeal in order to avoid a second trial is inapposite here.

> In its present posture, this case involves the question whether the Double Jeopardy Clause protects petitioners from being punished—not tried—on Count II of the 1979 indictment. As the Court recognized in *Abney v. United States, supra*, 431 U.S. at 660, this aspect of the protection afforded by the Double Jeopardy Clause 'can be fully vindicated on an appeal following final judgment * * *.' Thus, once the trial has been completed, immediate review under *Abney* should not be available even in the court of appeals, and a fortiori not in this Court. Instead, recourse must be had to the customary appellate process by seeking review of the final judgment of conviction and sentence."
>
> Memorandum for United States in Opposition, page 4.

On March 9, 1981, the United States Supreme Court denied the previous Petition for Writ of Certiorari. See 101 S.Ct. 1514.

Petitioners appealed from their judgments of conviction and raised again their Double Jeopardy claim. On September 3, 1982, the Ninth Circuit Court of Appeals affirmed petitioners' convictions and declined to modify the decision of the interlocutory panel. A copy of the September 3, 1982 opinion is set forth in the Appendix hereto. On November 1, 1982, petitioners' request for rehearing and suggestion for rehearing en banc was denied by the Ninth Circuit Court of Appeals. A copy of the order is set forth in the Appendix hereto.

B. Breach of 1975 Plea Agreement.

Petitioners attacked the inclusion of the Farkas extortion in Count Two as violative of their 1975 Plea Agreement with the federal government. The reporter's transcript of the plea agreement indicates that one of the crucial and negotiated elements relied upon when entering their guilty

pleas was the representation by the prosecutor that BROOKLIER and SCIORTINO would not thereafter be indicted for acts of which the prosecution had knowledge at the time of the pleas. The prosecutor specifically agreed to "clear the decks" in return for petitioners' guilty pleas in 1975.

After the indictment was returned on February 20, 1979, which indictment revived the Farkas extortion, petitioners moved to have the Farkas charged dimissed.

The District Court held a hearing on this matter from which the following was concluded:

(1) The Court made the factual finding that Brooklier and Sciortino reasonably thought the Farkas matter had been concluded by their 1975 plea agreement;

(2) The prosecutor conceded that it was reasonable for Brooklier and Sciortino to believe that the Farkas matter was concluded by their 1975 plea agreement;

(3) The prosecutor who entered into the 1975 plea arrangement with Brooklier and Sciortino did not inform them that Farkas could be revived if later crimes were allegedly committed;

(4) The prosecutor conceded that the plea agreement would have precluded the government from prosecuting Brooklier and Sciortino for the substantive extortion of Farkas;

(5) The Court made the factual finding that, at the very least, the plea arrangement contemplated that the government would not prosecute Brooklier and Sciortino for any action the government had knowledge of at the time the agreement was entered into.

Despite these conclusions, the District Court, without explanation or written opinion, denied defendants' motion to dismiss the indictment on the basis of the violation of the plea agreement.

In its opinion, the Ninth Circuit held that the findings of a district court on the meaning of a plea agreement are reviewable under the "clearly erroneous" standard, citing *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980). Without so much as one word of discussion regarding the unrefuted conclusions as set forth above, the Ninth Circuit panel opted for the all-inclusive determination that the record had been examined and the Court was of the opinion that the District Court's interpretation of the plea agreement is reasonable and not clearly erroneous.

It should be noted that it appears the inclusion of the Farkas extortion as an act of racketeering may have been essential to the prosecution being able to convict petitioners. Count Two charged a substantive violation of the RICO statute. By process of elimination based on the acquittals and government concession of insufficiency, it is evident that the jurors may have relied upon the Farkas extortion and the Sturman attempted extortion in order to find the *two* acts of racketeering required by the statute. 18 U.S.C. 1961(5).[1]

C. Insufficiency of Evidence With Regard to Farkas Extortion.

Counts One and Two set forth, among the racketeering activity relied upon by the prosecution, the extortions of Forex Company, an FBI undercover sting operation. At the Ninth Circuit level, petitioners argued and the government conceded that there was insufficient evidence to link peti-

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[1]The acts of racketeering alleged in Count Two consisted of the Frank Bompensiero murder, the Forex extortion, the attempted extortion of Reuben Sturman, the attempted extortion of Theodore Gaswirth, and the Farkas extortion. Petitioners were found not guilty of the separate and substantive charges relating to the Bompensiero murder and the Gaswirth extortion. The prosecutor has conceded insufficiency of evidence with regard to the Forex extortion as applied to petitioners.

tioners to the Forex extortions. At the conclusion of the prosecution's case, petitioners moved for partial judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) with regard to the Forex allegations contained in Counts One and Two. In effect, petitioners asked the Court to delete from the jury's consideration the Forex acts of racketeering insofar as they related to petitioners. The prosecution opposed petitioners' motion. The trial court denied petitioners' motion and, at a later point, stated that there was enough evidence to go to the jury with regard to the Forex charges as they related to petitioners. During closing argument, however, the prosecutor argued to the jury that petitioners were not involved in the Forex extortions, and that the Forex extortions should not be considered by them in determining their guilt or innocence regarding Counts One and Two. The issue presented to the Ninth Circuit Court of Appeals was whether the prosecutor's concession during closing argument to the jury guaranteed that petitioners were not convicted on Counts One and Two on the basis of the Forex charges in view of the fact that the Court charged the jury to consider the Forex allegations when deciding petitioners' guilt or innocence.

The Ninth Circuit, in its decision, holds that any error in allowing the insufficient Forex charges to go to the jury along with the other racketeering counts was harmless beyond a reasonable doubt. It was harmless, the panel held, because the prosecutor argued to the jury that petitioners were not involved in the Forex extortions and that the Forex extortions should not be considered in determining their guilt or innocence.

The question presented by this petition is whether or not the prosecutor's concession regarding Forex during closing argument is sufficient to assure this Court that the jury did not rely upon the Forex allegations to convict BROOKLIER

on Counts One and Two and SCIORTINO on Count Two in view of the fact that the trial court charged the jury to consider such evidence and charges.

D. Forex Federal Jurisdiction.

Petitioners hereby incorporate by reference the statement of the case and all arguments regarding the issue of whether federal jurisdiction under the Hobbs Act exists as set forth in the previously-filed Petition for Writ of Certiorari of co-defendant and co-appellant Jack Lo Cicero, Supreme Court Docket No. 82-5824.

REASON FOR GRANTING THE WRIT.

I.

THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE DOUBLE JEOPARDY CLAUSE WAS NOT VIOLATED BECAUSE IT FAILED TO RECOGNIZE THAT ADDITIONAL PROTECTION BEYOND BLOCKBURGER EXISTS IN THIS SUCCESSIVE PROSECUTION SITUATION.

The Farkas extortion should be considered the "same offense" for purposes of this Court invoking Double Jeopardy protection.

The primary deficiency of the Circuit Court's analysis lies in its failure to recognize that Double Jeopardy protection exists beyond that enunciated by this Court in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), in successive prosecution situations.[2]

A. The United States Supreme Court Has Stated That Additional Protection Beyond Blockburger Does Exist in Successive Prosecution Situations.

The instant case involves a successive prosecution. It has been stated that the Double Jeopardy Clause serves three primary purposes. First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969); *Brown v. Ohio*, 432 U.S. 161, 165, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977). The scope of each of these protections turns upon the meaning of the words "same offense". Indeed, this Court has indicated that the meaning of this phrase

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[2]The prosecution has always conceded that the 1974 Farkas extortion is factually the same extortion charged in the 1980 indictment.

may vary from context to context, so that two charges considered the same offense so as to preclude prosecution on one charged after an acquittal or conviction on the other need not be considered the same offense so as to bar separate punishments for each charge at a single proceeding. See *Brown v. Ohio, supra*, at 166, 167, n. 6, 53 L.Ed.2d 187, 97 S.Ct. 2221.

The Circuit Court ended its Double Jeopardy inquiry after application of the *Blockburger* test, which has primary significance in multiple charge, single prosecution settings. *Brown v. Ohio, supra*, at 166-167, n. 6, 53 L.Ed.2d 187, 97 S.Ct. 2221. While the *Blockburger* test is a valid starting point for analysis in successive prosecution situations, Petitioners contend that this Court has made it clear that inquiry must not end there.[3]

The Supreme Court has recognized that ". . . separate statutory crimes need not be identical—either in constituent elements or in actual proof—in order to be the same within the meaning of the constitutional prohibition." *Brown v. Ohio*, 432 U.S. 161, 164, 53 L.Ed.2d 187, 97 S.Ct. 2221

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[3]*Brown v. Ohio, supra*, at 166-167, n. 6, 53 L.Ed.2d 187, 97 S.Ct. 2221. While *Brown* found the *Blockburger* test determinative in a successive prosecution situation [crime of theft of automobile barred after conviction of lesser included offense of joyriding], the Court made it clear that Double Jeopardy protection beyond *Blockburger* exists in a successive prosecution situation. The Court stated that its failure to analyze *Brown* in light of this additional protection was a result of its lesser/greater included offense finding, not because Ashe-Nielsen protection did not exist. Cf., *United States v. Snell*, 592 F.2d 1083 (1979). Petitioners suggest the present case is a factual variant of *Snell*. In *Snell*, the successive prosecution took place immediately after remand by the Ninth Circuit and, therefore, did not constitute repetitive harassment. *Snell, supra* at 1085. In the present case, the Farkas extortion took place in 1973, petitioners were indicted in 1974, convicted by plea in 1975 and served their prison sentences in 1975 and 1976. The most recent indictment alleging the Farkas extortion was not returned until May 15, 1980. Unlike *Snell*, repetitive harassment exists in the case at bar.

(1977).[4] The fact, therefore, that the two statutes in question rest on different theoretical bases and could have been charged in separate counts of a single indictment is not dispositive of the issue. Where successive prosecutions are at stake, the guarantee serves ". . . a constitutional policy of finality for the defendant's benefit." *Brown, supra,* at 165, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977), quoting *United States v. Jorn,* 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1970).

B. Petitioners Should Have Been Protected From the Recent Successive Prosecution Based on Ashe-Nielsen Double Jeopardy Protection.

Various factors argue for a determination that the present successive Farkas allegation should be viewed as the same offense so as to give meaning to the constitutional policy of finality.

Retrying petitioners for the Farkas extortion required the relitigation of factual issues resolved in the 1974 case. The factual basis for the plea in the 1974 case indicates that the

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[4]It is clear that the Supreme Court has given Double Jeopardy protection against successive prosecutions where an application of the *Blockburger* rule of statutory construction would not have. *In re Nielsen,* 131 U.S. 176, 9 S.Ct. 673, 33 L.Ed. 118 (1889); *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). In commenting on these cases, the *Brown* court noted that the *Blockburger* test is not the only standard for determining whether successive prosecutions impermissively involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. *Brown, supra,* at 166 and 167, n. 6, 97 S.Ct. 2221, 53 L.Ed.2d 187. Moreover, Justice Rehnquist, in his dissent in *Whalen, supra,* 63 L.Ed.2d 715, 100 S.Ct. ...., has suggested that the *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining "compound" and "predicate" offenses, a situation the Supreme Court has not as yet faced in a Double Jeopardy context.

Farkas extortion was completed. During the taking of the guilty plea, government counsel stated:

> ". . . At the direction of Mr. DeRosa and on occasion Mr. Milano, Sam Farkas was shaken down and he paid in excess of $10,000.00 directly to Mr. Milano . . ."

This is significant because it is clear that the recent successive prosecution of petitioners regarding Farkas required the relitigation of factual issues already resolved by the first in contravention of *Nielsen. Brown, supra*, at 166 and 167, n. 6, 97 S.Ct. 2221, 53 L.Ed.2d 187.[5]

Petitioners' position that the instant successive prosecution should be barred is supported by the only statement in

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[5]Looking beyond the statutory language in successive prosecution situations for purposes of assessing and invoking Double Jeopardy protection is well accepted. In *Nielsen*, the Court held that "where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy." *Nielsen, supra*, at 188, 9 S.Ct. 673, 33 L.Ed. 118. In *Whalen, supra*, 63 L.Ed.2d 715, defendant was convicted in the same proceeding of rape and first degree murder for killing the victim while perpetrating the rape. The government's position was that the offenses should not be considered the same for Double Jeopardy purposes so as to prevent cumulative sentencing. The government argued that the felony murder and rape are not the same offense since felony murder does not in all cases require proof of rape. The Court refused, however, to view this question in the abstract and found that in the facts of that particular case proof of rape was a necessary element of proof of the felony murder. Further, in *Sanabria v. United States*, 98 S.Ct. 2170, 2179 (1978), the Court when deciding a Double Jeopardy claim noted: "The precise manner in which an indictment is drawn cannot be ignored because an important function of the indictment is to ensure that, 'in case any other proceedings are taken against [the defendant] of a similar offense, . . . the record [will] show with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran v. United States*, 157 U.S. 286, 290, 15 S.Ct. 628, 630, 31 L.Ed. 704 (1895)." *Sanabria, supra*, at 2179.

the legislative history of the RICO statute dealing with previously litigated crimes.[6]

> "Here, the prosecution, *absent any prior conviction*, would have to prove beyond a reasonable doubt two illegal acts in order to establish the 'pattern'." 116 Cong. Rec. 35208
>
> (Remarks of Rep. William F. Ryan, October 5, 1970). (Emphasis added.)

If one were to acccept the Circuit Court's analysis that in this successive prosecution situation the only issue to resolve is a recognition of the conspiracy/substantive dichotomy, the day following petitioners' plea in the 1974 case the government could have successively indicted them for a substantive RICO violation, alleging the precise same acts of racketeering as set forth in the conspiratorial RICO to which they pleaded. This preposterous scenario is not dealt with by the Court in its opinion, but is, nevertheless, no different than what the government did by the inclusion of the Farkas extortion in Count Two of the present case.

II.

THE PETITIONERS' 1975 PLEA AGREEMENT WITH THE GOVERNMENT WAS VIOLATED UNDER SANTOBELLO v. NEW YORK.

The District Court made a factual determination that, at a minimum, the 1975 plea agreement meant that BROOKLIER and SCIORTINO could not be substantively prose-

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[6]It is, perhaps, noteworthy at this point to mention that both Justices Brennan and Marshall, in their concurring opinions in *Brown, supra*, at 170, 53 L.Ed.2d 187, 97 S.Ct. 2221, appear to have taken a position which would ban the 1980 Farkas extortion prosecution because Farkas was not substantively prosecuted as one proceeding with the conspiratorial RICO in 1974. The same is true of their concurring opinion in *Harris v. Oklahoma*, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977), and their dissent from the denial of the petition for writ of certiorari in *Rivera v. Ohio*, Supreme Court Docket No. 82-5109.

cuted for any action the government had knowledge of at the time the agreement was entered into. Further, the Court made a factual determination that it was reasonable for BROOKLIER and SCIORTINO to believe that their 1975 plea agreement with the government ended the Farkas matter for all purposes. This point was also conceded by the government prosecutor. It was further conceded by the government prosecutor and recognized by the Court that at no point did the government inform the petitioners that the Farkas matter could be revived for purposes of a successive prosecution. Given the factual determinations and concessions by the prosecutor, as set forth hereinabove, the District Court, nevertheless, denied petitioners' motion to dismiss Count Two. The Ninth Circuit held that the findings of the District Court were not clearly erroneous.

A. The District Court's Determination That the Plea Agreement Was Not Breached Was Clearly Erroneous.

A plea bargain itself is contractual in nature and subject to contract law standards. *United States v. Arnett*, 628 F.2d 1162 (9th Cir. 1979); *United States v. Krasn*, 614 F.2d 1229 (9th Cir. 1980). Any dispute over the terms of the agreement is to be resolved by objective standards.

The essential question is what the parties to the plea bargain reasonably understood to be the terms of the agreement. *United States v. Arnett, supra*, at 1164; *United States v. Crusco*, 536 F.2d 21, 23, 27 (3d Cir. 1976). Petitioners maintain that, given the District Court's determination that petitioners reasonably believed, based on what had been represented by the prosecutor on the record, that the Farkas matter was at an end, and it follows that the District Court should have determined that a plea bargain agreement had been breached.

The fundamental teaching in this area comes from *Santobello v. New York*, 404 U.S. 257 (1971).

> "When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S., at 262.

The Supreme Court noted that the petitioner, in *Santobello*, had "bargained" for the particular plea, and that there must be "specific performance of the agreement". 404 U.S., at 262, 263.

The prosecutor's view is that, while the plea agreement would have precluded the government from successively prosecuting petitioners for the substantive Farkas extortion "in and of itself", the government was, nevertheless, free to include it as an act of racketeering in a subsequent substantive prosecution. This is a distinction without merit. First, it must be noted that the prosecutor conceded that nowhere in the transcript of the plea agreement was this set forth. Second, to construe the language of the plea agreement in that fashion makes no sense. For example, according to the prosecutor's theory, the government would have been free to include the Farkas extortion as well as another act of racketeering that was included in Count One of the 1974 indictment (to which the petitioners pled guilty) in Count Two of the present indictment, as long as the government included other acts of racketeering in Count Two which took place after the April 9, 1975 plea. The jury could then return a guilty verdict based solely on two acts of racketeering which were purportedly resolved by the 1975 plea agreement, a result even the prosecution has conceded would be improper.[7]

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[7]In fact, it may be that something like this did occur since Farkas may have been essential to the finding of guilt on Count Two. See Footnote 1, supra.

In the instant case, the petitioners objectively relied on the prosecutor's promise. They went to jail; BROOKLIER for twenty months and SCIORTINO for sixteen. Further, both agreed to waive the right to seek parole and both served the maximum amount of time available under the sentences that were meted out. As a result, the District Court should have commanded specific enforcement of the prosecutor's unfulfilled promise and dismissed the Farkas act of racketeering from Count Two.

III.

THE PROSECUTOR'S CLOSING ARGUMENT CONCEDING PETITIONERS WERE NOT INVOLVED IN THE FOREX EXTORTIONS REQUIRED REVERSAL OF COUNTS ONE AND TWO ON THE BASIS OF INSUFFICIENCY OF EVIDENCE.

Counts One and Two set forth, among the racketeering activity relied upon by the prosecution, the extortions of Forex Company, an FBI undercover sting operation. At the conclusion of the prosecution's case, the petitioners moved for a partial judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) with regard to the Forex allegations contained in Counts One and Two. In effect, the petitioners asked the Court to delete from the jury's consideration the Forex acts of racketeering insofar as they related to them. The prosecution opposed petitioners' motion. The Court denied petitioners' motion and, at a later point, stated that there was enough evidence to go to the jury with regard to the Forex charges as they related to petitioners. During closing argument, however, the prosecutor argued to the jury that BROOKLIER and SCIORTINO were not involved in the Forex extortions, and that the Forex extortions should not be considered by them in determining their guilt or innocence regarding Counts One and Two.

The Ninth Circuit held that the error in allowing the insufficient Forex charges to go to the jury along with the other racketeering counts was harmless beyond a reasonable doubt. It was harmless, the panel held, because the prosecutor told the jury that BROOKLIER and SCIORTINO were not involved in the Forex extortions and that the Forex extortions should not be considered in determining their guilt or innocence.

The question presented here is whether or not the prosecutor's concession regarding Forex during closing argument was sufficient to assure that the jury did not rely upon the Forex allegations to convict Brooklier on Counts One and Two and Sciortino on Count Two in view of the fact that the District Court charged the jury to consider such evidence and charges.

This issue necessarily raises considerations as to the nature and function of closing argument. It should be noted that, in taking the position that the error was harmless beyond a reasonable doubt, the Ninth Circuit cited no authority. Consistent with applicable law, the jury was instructed that statements and arguments of counsel are not evidence in the case. (See Devitt and Blackmar, *Federal Jury Practice and Instructions*, Section 11.11.) The jury, then, was legally bound to consider the Forex extortions as racketeering activity charged in Counts One and Two. Had the District Court granted Brooklier and Sciortino's partial Rule 29 motion as to Forex and had the jury been instructed to disregard Forex when considering the guilt or innocence of Brooklier and Sciortino on Counts One and Two, it would not be necessary to speculate as to whether the jury felt itself bound by the prosecutor's argument.

A judgment for acquittal pursuant to Rule 29 is an important safeguard to a defendant. It tests the sufficiency of the evidence against him, and avoids the risk that a jury

may capriciously find him guilty though there is no legal sufficient evidence for his guilt. In this case, the jury was instructed that it could consider the Forex extortions in deciding the guilt or innocence of Brooklier and Sciortino on Counts One and Two. Given that the Court instructions require the jury to consider such evidence, it cannot be legitimately argued that solely because the prosecutor told the jury that petitioners were not involved in Forex that the jury did not, nevertheless, consider Forex and use those extortions as acts of racketeering against Brooklier and Sciortino. (Apparently, the jurors did not consider themselves totally bound by the prosecutor's closing argument since it acquitted Brooklier and Sciortino of a number of counts despite the prosecutor's pleas that they should not do so.)

At a minimum, it is difficult to conceive of how the Ninth Circuit could take a position that such error was harmless beyond a reasonable doubt. Courts do not find error harmless when the evidence affects a crucial element of the case. *United States v. Miller*, 603 F.2d 109 (9th Cir. 1979). The inflammatory nature of the case is all the more reason to believe that the jury may have considered the Forex extortions in resolving the guilt or innocence of Brooklier or Sciortino on Counts One and Two.

Federal Rule of Criminal Procedure 30 requires that the Court, *not the prosecutor*, charge the jury. In *United States v. Hutchinson*, 338 F.2d 991 (4th Cir. 1964), it was determined to be error when the judge failed to charge the jury but, rather, relied upon the arguments of counsel. The Court held:

> "The trial court cannot adopt by reference the exposition of the law *as argued to the jury by counsel* and escape its duty to instruct under Rule 30 of the Rules

of Criminal Procedure." *United States v. Hutchinson*, at 991. (Emphasis added.)

Further, in *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 193, 56 L.Ed.2d 468 (1978) the United States Supreme Court, citing *United States v. Nelson*, 498 F.2d 1247 (5th Cir. 1974), stated that ". . . arguments of counsel cannot substitute for instructions by the Court." *Taylor v. Kentucky*, at 489-490. Yet, that is precisely what happened here. The trial court instructed the jury to consider the Forex charges as to the petitioners. The prosecutor told them not to. The Circuit, without more, finds "beyond a reasonable doubt" that the jury followed the prosecutor's argument and not the Court's instructions. To allow this holding to stand shocks the conscience.

IV.

FEDERAL JURISDICTION UNDER THE HOBBS ACT DOES NOT EXIST WHERE THERE IS NO ACTUAL OR POTENTIAL EFFECT ON INTERSTATE COMMERCE.

Petitioners hereby incorporate by reference the statement of the case and all arguments regarding the issue of whether federal jurisdiction under the Hobbs Act exists as set forth in the previously-filed Petition for Writ of Certiorari of co-defendant and co-appellant Jack Lo Cicero, Supreme Court Docket No. 82-5824.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DONALD B. MARKS,

Attorney for Petitioners.

APPENDIX A.

Order.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Dominic Phillip Brooklier and Samuel Orlando Sciortino, Defendants-Appellants. No. 80-1455.

Filed: Sept. 8, 1980.

Before: FLETCHER, ALARCON, and CANBY, Circuit Judges.

The district court's denial of the defendants' motion to dismiss is affirmed insofar as it rejects their double jeopardy defense. Under the test established in *United States v. Blockburger*, 284 U.S. 299 (1932), the defendants could have been charged in separate counts of a single indictment with both conspiracy to violate RICO and with substantive violations of RICO. *Iannelli v. United States*, 420 U.S. 770 (1975); *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied, sub nom. Little v. United States*, 100 S. Ct. 1345 (1980). The *Blockburger* test applied to post-conviction prosecutions. *Illinois v. Vitale*, 100 S. Ct. 2260 (1980); *Brown v. Ohio*, 432 U.S. 161 (1977); *United States v. Solano*, 605 F.2d 1141 (9th Cir.), *cert. denied*, 444 U.S. 1020 (1980); *United States v. Snell*, 592 F.2d 1083 (9th Cir.), *cert. denied*, 442 U.S. 944 (1979).

We express no opinion about the district court's denial of the defendant's motion to dismiss insofar as it rejects their contention that their plea bargain was breached. That issued is not raised in this interlocutory appeal.

An opinion may follow.

Chapter 96—Racketeer Influenced and Corrupt Organizations.

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473, relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restric-

tions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11; fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious

under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941, and amended Pub.L. 95-575, § 3(c), Nov. 2, 1978, 92 Stat. 2465; Pub.L. 95-598, Title III, § 314(g), Nov. 6, 1978, 92 Stat. 2677.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful

debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more that $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining order or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, nd shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are

imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.

Order.

United States of America, Plaintiff-Appellee, v. Dominic Phillip Brooklier and Samuel Orlando Sciortino, Defendants-Appellants. No. 80-1455.

United States Court of Appeals, Ninth Circuit.

Submitted Aug. 18, 1980.

Decided Sept. 8, 1980.

Opinion Filed Jan. 23, 1981.

Certiorari Denied March 9, 1981.

See 101 S.Ct. 1514.

Defendants moved to have charge dismissed under double jeopardy clause. The United States District Court for the Central District of California, Terry J. Hatter, Jr., J., entered judgment denying the motion. On defendants' interlocutory appeal, the Court of Appeals, Fletcher, Circuit Judge, held that Government could charge defendant with violations of Racketeer Influenced and Corrupt Organization Act, including conspiracy to extort from particular victim, and, after conviction, charge defendants with RICO violations including actual extortion from such victim where Government initially could have charged defendants with both conspiracy and underlying offense of extortion.

Affirmed.

Donald B. Marks, Anthony P. Brooklier, Marks Brooklier, Beverly Hills, Cal., for defendants-appellants.

James Henderson, U. S. Dept. of Justice, Los Angeles, Cal., for plaintiff-appellee.

Appellee from the United States District Court for the Central District of California.

Before FLETCHER, ALARCON, and CANBY, Circuit Judges.

FLETCHER, Circuit Judge:

In 1974 Dominic Brooklier and Samuel Sciortino were indicted for several counts of violating the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961-1968 (1976). Count I charged them with conspiring to conduct an extortion ring in violation of 18 U.S.C. § 1962(d) (1976).[1] One specific charge was that the defendants had conspired to extort money from Sam Farkas, a bookie. Several overt acts, including those resulting in the actual extortion from Farkas, were cited as being in furtherance of the conspiracy. On April 19, 1975, pursuant to a plea bargain, the defendants pled guilty to Count I and the other charges were dismissed.

Four years later the defendants were again indicted for violating RICO. Count II of the new indictment charged them with violations of 18 U.S.C. § 1962(c) (1976).[2] Most of the charges related to threats, extortion, and murder occurring after the 1975 conviction. One charge, however, revived the Sam Farkas incident. The government alleged that:

> In or about the Spring of 1973, in Los Angeles, California, the defendants extorted and caused the extortion of United States currency from Sam Farkas . . . .

Both the 1974 and 1979 charges related to a single incident of extortion from Farkas.

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[1] 18 U.S.C. § 1962(d) (1976) makes it unlawful to conspire to violate the substantive provisions of RICO.

[2] 18 U.S.C. § 1962(c) (1976) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

18 U.S.C. § 1961(1)(A) (1976) defines "racketeering activity" as including extortion. 18 U.S.C. § 1961(5) (1976) defines a "pattern" of racketeering activity as at least two acts thereof.

The defendants moved to have Count II dismissed under the double jeopardy clause insofar as it related to the Farkas extortion because they had already been convicted of conspiring to extort. The district judge denied the motion. The defendants brought this interlocutory appeal under *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).[3]

The double jeopardy clause of the fifth amendment states that "No person . . . shall . . . be subject for the same offence to be twice put in jeopardy . . . ." It establishes three distinct protections: (1) against a second prosecution for the same offense after acquittal; (2) against a second prosecution for the same offense after conviction; (3) against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). This appeal implicates the second protection. The only question presented is whether the government may charge a defendant with RICO violations including conspiracy to extort from Sam Farkas, and, after conviction, charge him with RICO violations including actual extortion from Sam Farkas.

The government insists that the *Blockburger* test is dispositive. In *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the Supreme Court considered whether several offenses charged in a single prosecution were sufficiently different to permit the imposition of multiple sentences without violating the double jeopardy clause. It established a test emphasizing a comparison of the elements of the offenses:

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[3]The defendants also contend that the government violated its agreement to dismiss all charges related to the Farkas incident in return for a guilty plea to one charge. This argument is not raised by this interlocutory appeal.

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. at 304, 52 S.Ct. at 182. The government's contention in the instant case rests on two propositions. The first is that *Blockburger* would have permitted the government to charge the defendants in a single prosecution with both violating RICO by conspiring to extort from Farkas and with violating RICO by actually extorting from Farkas. The second is that the *Blockburger* test applies without modification to all post-conviction prosecutions. The first proposition is irrefutable, the second problematic.

In *Iannelli v. United States*, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975), the Supreme Court held that under *Blockburger* a defendant could be charged in a single indictment with conspiracy and with the underlying substantive offense. Our court applied *Iannelli* to a RICO prosecution in *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied sub nom. Little v. United States*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980). Therefore, it is clear that the government initially could have charged defendants Brooklier and Sciortino with both conspiracy and the underlying substantive offense. *See United States v. Wylie*, 625 F.2d 1371 at 1381-82 (9th Cir. 1980).

The more difficult question is whether the *Blockburger* "same elements" test applies without modification to post-conviction prosecutions, *i. e.*, government attempts to bring charges that could have been joined with earlier charges but were not.

In analyzing the breadth of *Blockburger's* application, it is important to be mindful of the three distinct protections

embraced by the double jeopardy clause. Since *Blockburger* itself involved several charges brought in a single prosecution, it directly implicated only the protection against multiple punishments. The inquiry in such cases is limited to ascertaining the extent of the punishment authorized by Congress. *See United States v. Wylie*, 625 F.2d at 1381 (9th Cir. 1980).

A post-conviction indictment, in contrast, implicates not only the protection against multiple punishments but also the protection against a second prosecution after conviction. This protection arises from classic double jeopardy concerns that a defendant not be forced to "run the gauntlet" twice. Even if the government could have initially prosecuted a defendant for multiple offenses, further analysis is necessary if it charges him with only one and holds the others in reserve. Policies of assuring finality, sparing defendants the financial and psychological burdens of repeated trials, preserving judicial resources, and preventing prosecutorial misuse of the indictment process all come into play. *See generally* J. Sigler, *Double Jeopardy* 156 (1969); *The Supreme Court, 1976 Term*, 91 Harv.L.Rev. 70, 108 (1977).

Many commentators, drawing on these policies, suggest that the *Blockburger* test should be applied only to single prosecutions and not to successive ones. Regarding the latter, they advocate requiring joinder of all charges arising from the same transaction. Charges arising from a single transaction would have to brought in a single prosecution;

those omitted would be waived.[4] *See e. g.*, J. Sigler, *Double Jeopardy* 222-28 (1969); Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 Yale L.J. 962, 967-69, 976-81 (1980); *The Supreme Court, 1976 Term*, 91 Harv.L.Rev. 70, 106-114 (1977). This approach, labelled the "same transaction" test, has been adopted by the drafters of the ABA Criminal Justice Standards, *ABA Standards Relating to Joinder and Severance* § 1.3(c) (Approved Draft 1968), and the Model Penal Code, American Law Institute, *Model Penal Code* § 1.08-2(c) (Proposed Official Draft 1962). Its most eloquent spokesman is Justice Brennan. In *Abbate v. United States*, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959), for example, he stated that:

> to allow successive prosecutions of the several offenses, rather than merely the imposition of consecutive sentences after one trial of those offenses, would enable the Government to "wear the accused out by a multitude of cases with accumulated trials." Repetitive harassment in such a manner goes to the heart of the Fifth Amendment protection.

359 U.S. at 200, 79 S.Ct. at 673 (concurring opinion) (citation omitted). *See also Ashe v. Swenson*, 397 U.S. 436, 448-60, 90 S.Ct. 1189, 1196-1202, 25 L.Ed.2d 469 (1970)

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[4]Proponents of the same transaction test admit that there would be problems, albeit manageable ones, with defining a single transaction. *See, e. g., Ashe v. Swenson*, 397 U.S. 436, 454 n.8, 90 S.Ct. 1189, 1199 n.8, 25 L.Ed.2d 469 (1970) (Brennan, J., concurring). They also commonly advocate building certain safeguards into the test. For example, it has been suggested that successive prosecutions for offenses arising from a single transaction should not constitute double jeopardy if the separate trials are caused by the defendant's tactical moves, or if the second trial is due to the discovery of new evidence. *See, e. g.*, Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 Yale L.J. 962, 977 (1980).

(Brennan, J. concurring).[5] *Cf.* Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 Yale L.J. 962, 967-69, 976-81 (1980) (advocating a variant of the double jeopardy test whereby facts alleged in one prosecution could not be alleged in a later one).

The Supreme Court has never expressly rejecteed the same transaction test. It has, however, declined to strictly apply the *Blockburger* test to post-acquittal prosecutions, thereby indicating that *Blockburger* is not dispositive of all successive prosecutions. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).[6]

Several circuit courts have nevertheless concluded that the *Blockburger* test governs all double jeopardy claims save those precisely within the ambit of *Ashe v. Swenson*. Among them is our own circuit. *See, e. g., United States v. Solano*, 605 F.2d 1141 (9th Cir. 1979), *cert. denied sub nom. England v. United States*, 444 U.S. 1020, 100 S.Ct. 677, 62 L.Ed.2d 652 (1980); *United States v. Snell*, 592 F.2d 1083 (9th Cir.), *cert. denied*, 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315 (1979); *Brown v. Alabama*, 619 F.2d 376 (5th Cir. 1980); *United States v. Clark*, 613 F.2d 391 (2d Cir. 1979); *United States v. Brown*, 604 F.2d 557 (8th Cir. 1979). These conclusions are based on an interpretation of *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), in which the defendant was convicted of "joyriding" and then prosecuted for auto theft. State law defined joyriding" as a lesser included offense of auto theft. The

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[5]Justice Brennan has espoused the same transaction test in a series of concurrences and dissents, which he list in his dissent to the denial of certiorari in *Thompson v. Oklahoma*, 429 U.S. 1053, 1054, 97 S.Ct. 7680, 50 L.Ed.2d 770 (1977).

[6]In *Ashe v. Swenson*, Ashe allegedly robbed six poker players in a single incident. He was first prosecuted for robbing four of the gamblers. After acquittal he was prosecuted for robbing the other two. The Court held that principles of collateral estoppel barred the second trial.

Court held that the double jeopardy clause barred indictment for a greater offense after conviction for a lesser included offense, expressly applying the analysis set forth in *Blockburger*. The Court, though, did not declare the *Blockburger* test dispositive of all post-conviction prosecutions. In fact, the *Brown* holding is a very narrow one that follows directly from *Blockburger*. At no time could Brown have been charged with both joyriding and auto theft. The former is a lesser included offense of the latter; to charge him with both, even in a single prosecution, would violate the *Blockburger* test. If *Blockburger* barred simultaneous prosecution, *a fortiori* it barred successive prosecutions. 432 U.S. at 166, 97 S.Ct. at 2225.

Because *Brown* does not expand on *Blockburger*, it sheds no light on the standard which should be applied to successive prosecutions. Although *Blockburger* is a useful starting point, such cases involve dangers which seem to require interposition of additional protections. *See Jordan v. Virginia*, No. 78-6540 (4th Cir. June 2, 1980). We do not believe that *Brown* should be interpreted as necessarily requiring strict application of the *Blockburger* test to all post-conviction prosecutions. We also recognize many advantages of the same transaction test espoused by Justice Brennan and might well be moved to adopt it if we had free rein.[7]

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[7]The two Ninth Circuit cases interpreting *Brown* as applying *Blockburger* to all post-conviction prosecutions may have read *Brown* more broadly than was necessary. In *United States v. Solano*, 605 F.2d 1141 (9th Cir. 1979), *cert. denied sub nom. England v. United States*, 444 U.S. 1020, 100 S.Ct. 677, 62 L.Ed.2d 652 (1980), Solano had been prosecuted in 1968 for manufacturing drugs and conspiring to do so, and had been convicted. He was prosecuted in 1979 for RICO conspiracy charges that included, as overt acts, transactions subsumed by the prior conviction. The court rejected Solano's double jeopardy contention, applying the *Blockburger* test under the authority of *Brown* and finding no double jeopardy because the offenses comprised different elements.

In *United States v. Snell*, 592 F.2d 1083 (9th Cir.), *cert. denied*, 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315 (1979), Snell was prosecuted for attempted extortion and conspiracy to commit bank robbery, and

(footnote continued on following page)

We believe such a course is precluded, however, not only by the decisions of this circuit in *United States v. Solano* and *United States v. Snell*, but also by the Supreme Court's recent decision in *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). In *Vitale*, the defendant struck and killed two small children while driving an automobile. He was immediately cited for failing to slow to avoid pedestrians, and he pled guilty. Soon thereafter he was charged with voluntary manslaughter. He interposed a double jeopardy defense, and the Court remanded for a state court determination of the legal relationship between the two crimes. In so doing, the Court interpreted *Brown* as importing the *Blockburger* test to all post-conviction prosecutions, describing it as "the principal test for determining whether two offenses are the same for the purposes of barring successive prosecutions." 100 S.Ct. at 2265. The disposition in *Vitale* also seems to reject the same transaction test. Under that test there would be no need to remand, since the two offenses for which Vitale was successively prosecuted clearly arose from the same transaction.

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was convicted. When the conspiracy conviction was reversed on appeal the government began a new prosecution for attempted bank robbery. Snell contended that the new prosecution contravened the double jeopardy clause, asking the court to adopt Justice Brennan's same transaction test. The court declined the invitation, applied the *Blockburger* test, and held that double jeopardy did not lie. The court rejected Justice Brennan's same transaction approach because it "has not been adopted by the Supreme Court or this court; in [*Walker v. Loggins*, 608 F.2d 731 (9th Cir. 1979)] we reaffirmed our adherence to the traditional *Blockburger* standard." 592 F.2d at 1085. The fact that the Supreme Court had not adopted the Brennan approach is not controlling, however, since the Court had never considered a case squarely posing the issue. *Walker v. Loggins* does not appear to be on point; it is a basic *Blockburger* case involving a single prosecution for several offenses. *See also United States v. Snell*, 627 F.2d 186 (9th Cir. 1980) (rejecting Snell's attempt to reassert his double jeopardy claim).

The *Vitale* Court did not discuss the difficult questions raised by post-conviction prosecutions and we doubt that it intended to resolve them *sub silentio*. Nevertheless, we read *Vitale* as a tacit endorsement of the view that the *Blockburger* test, and nothing more, governs all post-conviction prosecutions. We must, of course, follow the Supreme Court's dictates however they are expressed. If the law of successive prosecutions is to be modified or clarified in this or some other more appropriate case, it will have to be by the Supreme Court and not by this panel.

The *Blockburger* test would permit simultaneous prosecution of the two charges at issue here. It was therefore permissible for the government to prosecute them successively. The judgment of the district court is affirmed.[8]

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[8]The defendants rely heavily on *In re Nielsen*, 131 U.S. 176, 95 S.Ct. 672, 33 L.Ed. 118 (1889). In that case Nielsen, a Mormon, was prosecuted for bigamous cohabitation, convicted, and then prosecuted for committing adultery the day after the cohabitation period ended. The court reversed the second conviction on double jeopardy grounds. Defendants Brooklier and Sciortino assert that *Nielsen* establishes a generic exception to the *Blockburger* test, one that encompasses their case. They base this assertion on a footnote to the *Brown* opinion in which the court discussed *Nielsen*. 432 U.S. at 166 n.6, 97 S.Ct. at 2226 n.6.

The defendants read far too much into *Nielsen*. It is an aberrational case from which it is impossible to discern a general rule, and the Court's footnote in *Brown* merely acknowledges that *Nielsen* might not fit the precise parameters of *Blockburger*. In the text of the *Brown* opinion, moreover, the Court implied that *Nielsen* is generally consistent with the *Blockburger* formulation, citing it for the proposition that when the same elements test bars a single prosecution for several offences it also bars their successive prosecution. 432 U.S. at 166, 97 S.Ct. at 2225. *See also Illinois v. Vitale*, 100 S.Ct. 2260, 2267 (1980); *United States v. Snell*, 592 F.2d 1083, 1085 n.2 (9th Cir.), *cert. denied*, 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315 (1979). As we have noted *supra*, at p. 622, the defendants in the instant case could have been prosecuted in a single trial for the two offenses at issue here. Consequently, even if *Nielsen* establishes a generic exception to *Blockburger*, that exception does not apply here.

APPENDIX B.

Opinion of the Court of Appeals.

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Dominic Phillip Brooklier, Samuel Orlando Sciortino, Louis Tom Dragna, Michael Rizzitello, and Jack Locicero, Defendants-Appellants.

D.C. No. CR 79-126(A). C.A. Nos. 81-1045, 81-1046, 81-1047, 81-1048, 81-1049 (Consolidated).

Filed: September 3, 1982.

Appeal from the United States District Court for the Central District of California. Terry J. Hatter, Jr., District Judge, Presiding.

Argued and Submitted: January 5, 1982.

Decided:

Before: KENNEDY and SCHROEDER, Circuit Judges, and SOLOMON,* Senior District Judge.

PER CURIAM:

Appellants are members of La Cosa Nostra, a secret national organization engaged in a wide range of racketeering activities, including murder, extortion, gambling, and loansharking. They appeal their convictions for violating the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §1962 and the Hobbs Act, 18 U.S.C. §§1951(a) and 2.

At a seven-week trial, the government showed that beginning in 1972, members of the Los Angeles "family" extorted money from pornographers and bookmakers.

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*Hon. Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Among their targets were Sam Farkas, Theodore Gaswirth, and Reuben Sturman. They also obtained money from Forex, an FBI-operated pornography business.

Much of the evidence consisted of testimony by extortion victims, including the FBI agents who ran the Forex operation. Aladena "Jimmy the Weasel" Fratianno, an FBI informant, described the internal organization and operations of La Cosa Nostra as an ongoing enterprise engaged in racketeering. Fratianno gave details on meetings, orders, and actions of the entire organization, including plans to murder Frank Bompensiero, an informant. He linked the individual acts of extortion to the leaders of La Cosa Nostra.

The indictment charged Brooklier, Sciortino, Dragna, Locicero, and Rizzitello (appellants) with racketeering in violation of RICO,[1] extortion,[2] obstruction of jus-

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[1]18 U.S.C. §1962(c) & (d) provide:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
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> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

"Enterprise" and "pattern of racketeering activity" are defined in 18 U.S.C. §1961(4), (5):

> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
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> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

[2]18 U.S.C. §1951 provides, in part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
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> * * *
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> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of

(footnote continued on following page)

tice,[3] and aiding and abetting.[4]

Count 1 charged all five appellants with conspiracy to commit RICO; the jury convicted all except Sciortino on this count. Count 2 charged all the appellants with a substantive violation of RICO; the jury convicted all of them. Count 3 charged that all appellants extorted money from Theodore Gaswirth and from his pornography business; all of the appellants were acquitted on this count. Count 4 charged appellants Rizzitello and Locicero with extorting money from Forex; the jury convicted both of them. Count 5 charged Brooklier, Sciortino, and Dragna with obstruction of justice through the murder of Frank Bompensiero, an informant; the jury acquitted all of them on this count.

Most of the issues raised on appeal challenge the racketeering acts on which the RICO convictions are based. The

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actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

[3]18 U.S.C. §1510 provides, in part:

"Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—

Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

[4]18 U.S.C. §2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

convictions on Count 1 are based on the racketeering activities charged in Counts 3, 4, and 5, and the extortion from Reuben Sturman and the Sovereign News Company in Cleveland, Ohio. The convictions on Count 2 are based on the same activities as Count 1 and the extortion of money from San Farkas in Los Angeles, California. The RICO counts allege that each of the defendants has engaged in, or conspired to engage in, at least two acts of "racketeering," as that term is defined by 18 U.S.C. §1961(1).

I.

DOUBLE JEOPARDY

In 1974, Dominic Brooklier and Samuel Sciortino were indicted for RICO violations. The indictment included a charge that in 1973, they conspired to conduct an extortion ring. One specific charge alleged that they conspired to extort money from Sam Farkas, and several specific acts by which they extorted money from Farkas were cited. In April, 1975, based on a plea agreement, Brooklier and Sciortino pleaded guilty to this conspiracy count; the other counts were dismissed.

In 1978, Brooklier and Sciortino were again indicted. Count 2 of the new indictment charged a RICO violation, but unlike the 1974 indictment, they were charged with a violation of a different subsection.[5] Although most of the charges in the 1980 indictment refer to acts which occurred after the 1975 conviction, one of the acts was the same act set forth in the 1974 indictment to which those appellants

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[5]The 1974 indictment charged these appellants under 18 U.S.C. §1962(d), which makes it unlawful to engage in a conspiracy to conduct an extortion ring. The 1980 indictment charges the appellants with violation of 18 U.S.C. §1962(c), which makes it unlawful to participate in an enterprise affecting interstate commerce through a pattern of racketeering activity.

pleaded guilty. It charged they "extorted and caused the extortion of United States currency from Sam Farkas."

Brooklier and Sciortino moved to dismiss the Farkas incident in Count 2 on the ground of double jeopardy. The district Court denied the motion and appellants filed an interlocutory appeal. This court affirmed the district court and held under *Blockburger v. United States*, 284 U.S. 299 (1932), there was no double jeopardy. *United States v. Brooklier*, 637 F.2d 620 (9th Cir. 1980).

Although we have discretion to modify this interlocutory decision, *see United States v. Snell*, 627 F.2d 186, 188 (9th Cir. 1980), we decline to do it. *Blockburger* permits the government to charge the defendants with two or more offenses arising from the same transaction when the offenses have distinct elements. Under *Blockburger*, if appellants had not been indicted and convicted in 1974, the government in the 1980 indictment could have charged Brooklier and Sciortino with both conspiracy to violate RICO and with a substantive RICO offense both partly based on the Farkas extortion. Therefore, their prior convictions on a RICO conspiracy charge, which contained the Farkas extortion, do not bar conviction for a substantive RICO violation based partly on the same Farkas extortion. *United States v. Solano*, 605 F.2d 1141, 1143 (9th Cir. 1979), *cert. denied, sub nom. England v. United States*, 444 U.S. 1020 (1980).

The double jeopardy challenge is rejected.

II.
THE 1975 PLEA AGREEMENT

Brooklier and Sciortino contend the 1975 plea agreement prevents the government from including the Farkas extortion in any subsequent indictment. The government, on the other hand, contends the plea agreement was limited to the abatement of pending and planned federal or state investigations

and charges. The district court agreed with the government's interpretation of the plea agreement.

The findings of a district court on the meaning of a plea agreement are reviewable under the "clearly erroneous" standard. *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980). We have examined the record and are of the opinion the district court's interpretation of the plea agreement is reasonable and is not clearly erroneous.

There is no merit to appellants' contention that the 1980 indictment should be dismissed because it was obtained in violation of the government's policy against multiple prosecutions for the same transactions. *Petite v. United States*, 361 U.S. 529 (1960). The *Petite* doctrine relates to the Justice Department's internal position that successive indictments will not ordinarily be based on the same conduct in order to avoid unnecessary multiple prosecutions. Except in extraordinary circumstances, it is a policy not reviewable by the courts. *United States v. Snell*, 592 F.2d 1083, 1087-88 (9th Cir.), *cert. denied*, 442 U.S. 944 (1979); *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir.), *cert. denied*, 439 U.S. 842 (1978).

III.
VINDICTIVE PROSECUTION

The 1978 indictment, which did not mention the Farkas extortion, was dismissed on motion of the appellants because of voting irregularities in the grand jury. In the subsequent indictment, the Farkas extortion was added in Count 2.

Brooklier and Sciortino contend the addition of the Farkas extortion in the subsequent indictments violates the vindictiveness doctrine. The doctrine of presumed vindictiveness applies when the Government increases the severity of the charges against the defendant under circumstances

that pose a "realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights." *United States v. Gallegos-Curiel*, No. 81-1258, slip op. at 3230, 3234-35 (9th Cir. July 21, 1982). Here, the 1978 indictment was replaced by an indictment containing fewer charges and lighter penalties. The vindictiveness doctrine does not apply. *United States v. Rosales-Lopez*, 617 F.2d 1349, 1357 (9th Cir. 1980).

Even if the addition of the Farkas extortion somehow subjected Brooklier and Sciortino to a greater risk of punishment, vindictiveness could not be presumed. No reasonable likelihood of vindictiveness arises when the prosecutor increases the charges prior to trial, because he "may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance." *United States v. Goodwin*, 102 S. Ct. 2485 (1982). The prosecutor's initial charging decision should not freeze future conduct and the Government may reevaluate the societal interest in prosecution prior to trial, *id*, at 12-13; *Gallegos-Curiel*, slip op. at 3235-37, especially when, as here, "the prosecutor is required by court order to obtain a new indictment" and thus "will *necessarily* have to review the evidence and reconsider what charges to present to the grand jury." *United States v. Banks*, slip Op. at 3443, 3447 (9th Cir. July 29, 1982) (emphasis in original). The district court correctly dismissed the appellants' vindictive prosecution claim.

IV.

DEFENDANTS' RIGHT TO TESTIFY

Brooklier and Sciortino contend the Farkas extortion charge precluded them from testifying in their own defense because their 1975 guilty pleas would have required them

to admit their participation in the Farkas extortion based on the 1975 guilty plea.

This contention is incorrect. They accepted sentencing under *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), and did not admit their guilt. They only consented to the imposition of the penalty for that count. They could have testified to their reasons for entering into the 1975 plea agreement.

Appellants' decision not to risk cross-examination was purely tactical. Among other reasons, they wanted to avoid impeachment by evidence of prior convictions. "The constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging constitutional rights." *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980).

The Farkas extortion charges was properly included in the 1980 indictment.

V.

AMBIGUITY OF THE INDICTMENT

Appellants contend that Count 1 of the indictment, which charges defendants with a RICO conspiracy, contains ambiguous and legally impossible pleadings. They assert that the racketeering activities set forth in Count 1 include conspiracy charges, and that a "conspiracy to conspire" to commit acts of extortion is an illogical and ambiguous allegation.

The essence of a RICO conspiracy is not an agreement to commit racketeering acts, but an agreement to conduct or participate in the affairs of an enterprise through a pattern of racketeering. 18 U.S.C. §1962(c); *United States v. Zemek*, 634 F.2d 1159, 1170 N.15 (9th Cir. 1980). A "pattern of racketeering activity" is expressly defined as

at least two acts of racketeering activity. 18 U.S.C. §1961(5).

Conspiracies or attempts can serve as the underlying racketeering activities because 18 U.S.C. §1961(1)(B) defines "racketeering activity" as including those offenses indictable under 18 U.S.C. §1951. Section 1951, in turn, makes punishable attempts or conspiracies to obstruct, delay, or affect commerce by robbery, extortion or physical violence.

Thus, the statutory language of sections 1962, 1961 and 1952 allows for the indictment as written. A series of conspiracies and failed attempts constitutes a "pattern of racketeering activity" within the meaning of 18 U.S.C. §1961(5), even if no racketeering offense is completed. The district court in its instructions adequately explained these distinctions. In addition, appellants have failed to show that this so-called ambiguity has prejudiced them.

VI.

FAILURE TO DISMISS THE FOREX EXTORTION CHARGE

Count 4 charges the appellants with an attempt and conspiracy to extort money from Forex, the undercover business operated by FBI agents. The Forex activities are among the racketeering acts supporting the RICO violations in Counts 1 and 2.

Two of the Forex extortion payments were made in California and the third in Nevada. Appellants contend that the California payments provide no basis for federal jurisdiction under the Hobbs Act, 18 U.S.C. §1951. They assert a lack of nexus with interstate commerce, because the FBI business was a fiction, and had no actual or potential effect on interstate commerce. They also contend that the Nevada payment did not meet jurisdictional requirements because the federal agents demanded payment in Nevada for the sole purpose of manufacturing jurisdiction.

Judge Pregerson, then a district judge, rejected these contentions on the ground that factual impossibility is no defense to an inchoate offense. *United States v. Brooklier*, 459 F.Supp. 476 (C.D. Cal. 1978). His analysis has now been adopted by this court, *United States v. Bagnariol*, 665 F.2d 877, 895-96 (9th Cir. 1981), as well as the Third Circuit in *United States v. Jannotti*, 673 F.2d 578, 592-94 (3d Cir. 1982) (en banc), *pet. for cert. filed*, 50 U.S.L.W. 3961 (June 8, 1982), which held that an actual potential effect on interstate commerce was not a jurisdictional prerequisite for a conviction of conspiracy to violate the Hobbs Act.

Appellants also contend that the federal agents "manufactured jurisdiction" by requiring payment in Nevada. They rely on *United States v. Archer*, 486 F.2d 670, 682 (2d Cir. 1973), in which agents placed telephone calls from another state in order to transform a local bribery into a federal crime. Here, both the appellants and federal agents engaged in activities of an interstate character. Jurisdiction had already been established by the nature of the activities themselves.

We hold there was sufficient nexus with interstate commerce to satisfy federal jurisdictional requirements.

VII.

DIVISIBILITY OF FOREX EXTORTION PLAN

Defendants contend that the Forex extortion, consisting of three separate payments, is really a single offense which the FBI extended over a period of time in order to satisfy the "pattern of racketeering" requirement under the RICO statute.

In *United States v. Tolub*, 309 F.2d 286, 289 (2nd Cir. 1962), the court held that each acceptance of payment by the defendant during the period of an extortion scheme con-

stituted a separate act of extortion. *See also, United States v. Addonizio*, 451 F.2d 49, 59-60 (3rd Cir.), *cert. denied*, 405 U.S. 936 (1972). Here, each payment resulted from appellants' initial threats in an ongoing extortion scheme and each payment was a separate act of racketeering within the meaning of 18 U.S.C. §1961(1).

VIII.

ADMISSION OF DRAGNA'S ORAL STATEMENTS

From 1969 until 1976, Dragna had a number of conversations with FBI Agent John Nance in which Nance attempted to develop Dragna as an informant. In 1976, Dragna was subpoenaed to appear before a federal grand jury. Dragna called Nance for help. Nance told Dragna that if he cooperated, their conversations might be kept confidential. The time for appearance was continued, but Dragna was not promised immunity. Dragna's statements during his conversations with Nance were admitted at trial.

To protect the voluntariness of a waiver of Fifth Amendment rights, the government must keep its promise of immunity. *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, 347 (1963). However, the mere threat of a grand jury subpoena for failure to cooperate does not constitute an offer of immunity. Statements made in confidence are not immune absent an unconditional promise of confidentiality. *See Matter of Wellins*, 627 F.2d 969, 972 (9th Cir. 1980). The district court found that there was no binding agreement, and that the statements were admissible against Dragna. We agree.

Dragna's contention that he was deprived of his Fourth Amendment rights because the Grand Jury subpoena was a "ruse designed to cultivate him as an informant" has no merit. No evidence was offered to support this contention. *Dunaway v. New York*, 442 U.S. 200 (1979), the case

Dragna cites in support of that contention, considered whether a confession is admissible when police took the defendant into custody, and detained and interrogated him when there was no probable cause to arrest. Here, there was no detention or custodial interrogation.

Dragna also asserts that the statements were involuntary because he was influenced by threats of a Grand Jury investigation and promises of confidentiality. The record shows that there was no coercion or threats, and that Dragna was warned to be careful of what he said. The methods used were constitutionally permissible.

IX.
BRUTON OBJECTIONS

Dragna, in his statement to Nance, admitted he was "acting" boss of the Los Angeles La Cosa Nostra family, and he named all the other appellants as members of the family. The names of the other appellants were deleted from his statement and the jury was instructed that Dragna's statement could only be considered against him.

Dragna did not testify. Nevertheless, through other witnesses, the jury learned Brooklier and Sciortino were in prison at the time. Brooklier and Sciortino contend that Dragna's statement that he was the acting boss compels the inference that he was acting in place of Brooklier and Sciortino, and that a severance was necessary under *Bruton v. United States*, 391 U.S. 123 (1968).

The district court properly denied the motion to sever. Even if the edited statement hinted that Brooklier and Sciortino were members of the Los Angeles family, this inference was not sufficiently incriminating to require severance, because both sides stipulated and told the jury that mere membership in La Cosa Nostra was not unlawful. Courts need not grant a *Bruton* severance unless the statements of the

non-testifying defendant clearly inculpate his codefendants. *E.g., United States v. Knuckles*, 581 F.2d 305, 313 (2d Cir. 1978). As in *United States v. Wingate*, 520 F.2d 309, 314 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976), it is "[o]nly when combined with considerable other evidence, which amply established [Brooklier and Sciortino's] guilt, [that] the statements tend to implicate [them]."

X.

ADMISSION OF FRATIANNO'S PLEA AGREEMENT

During the trial, defense counsel referred to government witness James Fratianno as a perjurer, paid informant, and murderer who escaped the death penalty by cooperating with the FBI, and whose book sales would be enhanced by a conviction. In rebuttal, the government introduced Fratianno's plea agreement, which required Fratianno to testify truthfully. Appellants contend that under *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980), this evidence permitted the government to improperly vouch for Fratianno's credibility.

Although, as the court in *Roberts* pointed out, plea agreements are admissible on the issue of bias, they are not to be used as a basis for supporting the truthfulness of the witness' testimony. In *Roberts*, the United States Attorney argued to the jury that a government witness testified truthfully because he was afraid of violating his plea agreement, and that the government, to ensure he would testify truthfully, placed a detective in court when the witness testified. We reversed the conviction primarily because the statement that the detective was monitoring the witness improperly referred to facts outside the record. Here, no such argument was made. In fact, whenever the plea agreement was mentioned during the trial, the court cautioned the jury that the agreement requiring the witness to testify truthfully did not

mean that the testimony was in fact truthful. The court also told the jury that the government could not vouch for the truth of the testimony and that the jurors were the sole and exclusive judges of the credibility of all witnesses. These instructions adequately dispelled any suggestion of vouching.

XI.

STURMAN EXTORTION: UNCORROBORATED ACCOMPLICE TESTIMONY

Appellants contend Fratianno's testimony was insufficient as a matter of law for the jury to find that the appellants attempted to extort money from Reuben Sturman, because Fratianno was an accomplice and his testimony was uncorroborated. Fratianno testified at length on many subjects and he was thoroughly cross-examined. His testimony in other areas was corroborated in many details. There was adequate evidence to satisfy the rule of *United States v. Sigal*, 572 F.2d 1320, 1324 (9th Cir. 1978), that the uncorroborated testimony of an accomplice is sufficient to support a conviction so long as it is not incredible or unsubstantial on its face.

We hold Fratianno's testimony meets this standard and is adequate to support the RICO convictions based on the Sturman extortion charge.

XII.

ADMISSIBILITY OF CO-CONSPIRATOR STATEMENTS

Fratianno testified he told Tony Delsanter and Leo Moceri that Brooklier and Sciortino wanted them to extort money from Reuben Sturman, a dealer in pornography. Fratianno also testified that Delsanter later reported that he and Moceri had done the job. Delsanter introduced Fratianno to Glenn Pauley, the man who had "grabbed" Sturman. This testimony was the only link connecting Brooklier and Sciortino

to the Sturman extortion attempt. Neither Delsanter nor Moceri testified.

Brooklier and Sciortino contend that the statements made by Delsanter and Moceri were inadmissible hearsay because the co-conspirator exception to the hearsay rule, Fed.R.Evid. 801(d)(2)(E), requires the declarant's involvement in the conspiracy to be corroborated by independent evidence. *United States v. Snow*, 521 F.2d 730, 733 (9th Cir. 1975).

Once the conspiracy was shown to exist, only slight evidence was required to support a finding that Delsanter and Moceri were part of the conspiracy. *United States v. Calaway*, 524 F.2d 609, 612 (9th Cir. 1975).

Here, there was ample evidence that a conspiracy did exist and that Dragna, Brooklier, Sciortino, Frantianno and others were members of it. Fratianno testified that Brooklier and Sciortino, with the approval of Dragna, the top man, directed Fratianno to go to Cleveland, meet with Delsanter and Moceri, and get them to arrange to shake down Sturman. Fratianno testified that he went to Cleveland and met with Delsanter and Moceri and brought them the message. Thereafter, they told Fratianno that they had done the job through Glenn Pauley, to whom they introuced Fratianno. Sturman later identified Glenn Pauley as the man who attempted to extort money from him.

In determining whether Delsanter and Moceri were part of the conspiracy, we treat testimony on their statements as independent evidence of their participation. We consider their statements not for their truth, but as verbal acts to show involvement. *Calaway*, 524 F.2d at 613. The court in *Calaway*, after setting forth the test for admissibility of hearsay statements of co-conspirators, stated:

> In considering this question, we treat testimony by witnesses about statements made by [the alleged con-

> spirators] as part of the independent evidence of their participation in the conspiracy. Such statements by them are not received to establish the truth of what they said but to show their own verbal acts.

Delsanter's statement indicates that he and Moceri were aware of the scope and purpose of the extortion conspiracy, and that they agreed with those goals. This evidence is sufficient to link Delsanter and Moceri to the conspiracy.

The district court correctly admitted the statements of Delsanter and Moceri under the co-conspirator exception to the hearsay rule.

XIII.
COUNTS 1 & 2: SUFFICIENCY OF EVIDENCE TO CONVICT DRAGNA

Dragna argues that there was insufficient evidence to connect him to the Sturman and Forex extortions. He points out that the jury acquitted him on the Gaswirth extortion and on the obstruction of justice charges. He argues that this leaves no underlying racketeering acts for his RICO convictions.

Inconsistent verdicts do not require reversal unless there is insufficient evidence to sustain the guilty verdict. *United States v. McCall*, 592 F.2d 1066, 1068 (9th Cir. 1979); *Dunn v. United States*, 284 U.S. 390, 393 (1932).

The evidence was sufficient to convict Dragna on both the RICO conspiracy and RICO substantive counts. The evidence showed that Fratianno acted as Dragna's agent in making arrangements for the Forex extortions. Dragna retained ultimate control over the Los Angeles La Cosa Nostra and he instructed Frank Bompensiero to make money for the family. He planned and agreed to Bompensiero's murder and he approved of the plans to shake down Sturman and

Gaswirth. Dragna was to benefit from all of these operations.

Considered in the light most favorable to the verdict, the evidence and the inferences drawn from the evidence were sufficient to sustain Dragna's convictions on both counts. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

XIV.
SUFFICIENCY OF EVIDENCE TO CONVICT BROOKLIER AND SCIORTINO

Brooklier and Sciortino contend that their convictions under Count 2, a substantive RICO count, must be reversed because there was insufficient evidence of their involvement in the Forex extortions. The United States Attorney, in his closing argument, conceded that Brooklier and Sciortino were not involved in those extortions.

In *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), the court held a RICO conviction which is based on the same act upon which a non-RICO substantive count is based, must be reversed if the conviction on that substantive count is reversed. The court reasoned that this result is necessary because it would be impossible to determine whether the jury relied on an impermissible underlying offense to reach its verdict on the RICO count.

However, in this case, even if the evidence of the Forex extortion was insufficient, the error in allowing the charges to go to the jury along with the other four charges of extortion was harmless beyond a reasonable doubt. It is harmless because the United States Attorney told the jury that Brooklier and Sciortino were not involved in the Forex extortions and that the Forex extortions should not be considered in determining the guilt or innocence of Brooklier and Sciortino.

Brooklier also contends that his acquittals on other counts compel the conclusion that the jury relied solely on the Sturman extortion in convicting him on the RICO conspiracy count. Although at least two acts of racketeering are necessary to convict a defendant of a substantive RICO offense, it is unnecessary in a conspiracy to commit RICO to show that a particular defendant personally committed any act of racketeering.[6] We, therefore, hold that the conviction of Brooklier on the conspiracy count (Count 1) must be affirmed regardless of whether he personally committed any act of racketeering, even though we find that the evidence amply supports a finding that Brooklier did, in fact, commit at least two acts of racketeering.

Appellants also contend that the district court erred in denying their Rule 14 pretrial severance motion because Brooklier, Sciortino and Dragna were not charged under Count 4, the Forex extortion count. This contention has no merit. The Forex extortion evidence was relevant because Brooklier and Sciortino remained members of La Cosa Nostra during the time the Forex extortions were committed by co-conspirators. It was also relevant because the Forex extortion activity became the motive for killing Bompensiero, an act for which Brooklier and Sciortino were indicted in Count 5.

We therefor reject the contention of Brooklier and Sciortino that their convictions must be reversed for lack of sufficient admissible evidence to convict. We also hold that the district court did not abuse its discretion in denying the severance motion.

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[6]For an excellent discussion of this issue, see the statement of Chief Judge Owen in *United States v. Hawkins*, 516 F. Supp. 1204, 1208 (M.D. Ga. 1981).

XV.

ELECTRONIC SURVEILLANCE: REQUIREMENT OF A SUPPRESSION HEARING

Before trial, Brooklier moved to suppress a tape recording of his conversation with Fratianno on an extortion plan. Brooklier contends that the court order authorizing the electronic surveillance was issued on the basis of an affidavit which failed to set forth a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed," as required by 18 U.S.C. §2518(1)(c).

Brooklier asserts that Fratianno was a paid government informant who could have infiltrated the individuals under investigation, and that electronic surveillance was therefore unnecessary. He further asserts that the government's application for the surveillance failed to include the fact that Fratianno was a paid informant.

The district court, without holding a hearing, denied Brooklier's motions to suppress. The tape was played to the jury.

The government contends that there was no need to set forth the information about Fratianno because when the conversation with Brooklier was taped, Fratianno was still under investigation. He did not become fully cooperative until later.

The fact that the government doubted whether Fratianno was fully cooperative did not relieve it of the obligation to set forth those facts. It was for the court to determine its materiality.

In *Franks v. Delaware*, 438 U.S. 154, 155-6 (1978), the Supreme Court held:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and

> intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probably cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

The court also held that if the hearing showed the false statement to be material, the evidence must be suppressed.

In *Franks*, a search warrant was issued based on an affidavit containing deliberate misstatements. Here, although the problem is one of omission rather than misstatement, the initial burden for purposes of obtaining a hearing remains on the defendant. The defendant must show that the omission was deliberate or made in bad faith. Brooklier has demonstrated no more than negligence on the Government's part. Mere negligence in preparing the affidavit for a wiretap order is not sufficient to suppress the evidence obtained. *Id.* at 170.

Although the government should have included information required by the wiretap statute, 18 U.S.C. §2518(1)(c), we hold the district court, in failing to hold a hearing and in admitting the tape in evidence, did not commit error because there was no evidence of deliberate omission in the government's affidavit.

XVI.
JURY INSTRUCTIONS

Appellants contend that the jury was improperly instructed on the elements of a conspiracy to commit RICO. They assert that the jury was instructed to convict if they found multiple conspiracies to commit two or more acts of racketeering even though no overall conspiracy existed.

The instructions which the court gave on this issue were jointly drafted by counsel for both the government and the appellants. Later, in response to a question from the jury,

appellants objected to a clarifying instruction proposed by the government. They asked that no additional instructions be given because the previous instruction, based on a Blackmar & Devitt instruction, was clearer than the tendered one, and had "proved to be true and useful over the years." Later, the court, in response to another inquiry from the jury, told them:

> Each individual has to have knowledge of two or more racketeering acts and been a part of and committed those, and as part of those it could be conspiracies to commit those racketeering acts.

Although the instructions on this issue were not models of clarity, any ambiguity was harmless to appellants and actually favored them.

The purpose of the RICO statute is to allow a single prosecution of persons who engage in a series of criminal acts for an enterprise, even if different defendants perform different tasks or participate in separate acts of racketeering. The same persons need not commit or endorse the same acts of racketeering. It is sufficient if a defendant who participates in an enterprise through a pattern of racketeering knows that the enterprise operates by a pattern of racketeering. The pattern may be established by showing two or more acts that constitute offenses, conspiracies, or attempts of the requisite type, as long as the defendant committed two of the acts and both of them were connected by a common scheme, plan or motive.

In addition, it is a crime to conspire to commit the substantive RICO offense. 18 U.S.C.A. §1962(d) (Supp. 1982). This overall conspiracy requires the assent of each defendant who is charged, although it is not necessary that each conspirator knows all of the details of the plan or conspiracy. *United States v. Elliott*, 571 F.2d 880, 900-05 (5th Cir.), *cert. denied*, 439 U.S. 993 (1978).

Conspiracy to carry on an enterprise through racketeering, section 1962(d), is a separate crime from the participation in an enterprise through racketeering acts such as conspiracy or attempts, section 1962(c). The distinction between a conspiracy to violate the RICO statute, and a conspiracy or attempt committed as part of a pattern of racketeering activity, depends on the time the conspiracy is formed and its objective. If the agreement or combination is undertaken to establish or participate in an enterprise and to do it through a pattern of racketeering, there is a conspiracy to commit the underlying RICO offense. If the enterprise is in existence and it is aided by attempts or conspiracies of the kind proscribed by the statute, such attempts or conspiracies may be part of the pattern of racketeering.

The instructions given here required each defendant to agree to participate in two specific racketeering acts, even on Count 1. The term "enterprise" was defined and the jury told that they must find each defendant was employed by or associated with a racketeering enterprise, and that the racketeering offenses were connected by a common scheme, plan, or motive so as to constitute a pattern "and not merely a series of disconnected acts." They were also told they must find "through the commission of two or more connected offenses the defendant conducted or participated in the conduct of the enterprise." These instructions were adequate to inform the jury of the elements of a RICO conspiracy, and required them to find an overall conspiracy to conduct an enterprise through a pattern of racketeering activity before they could find appellants guilty.

To the extent the trial court's instructions can be interpreted to require that each defendant actually participate in two or more acts of racketeering in order to be guilty of conspiracy to violate RICO under section 1962(d), the in-

structions posed an unnecessary burden on the Government that in no way prejudiced the appellants.

There is no merit in appellants' contention.

XVII.
JURY SELECTION

Before trial, appellants sought to excuse for cause four jurors who on voir dire stated they believed there existed an organization known as La Cosa Nostra whose members are engaged in organized crime. Appellants later exhausted all of their peremptory challenges, many of which were exercised against jurors who had no opinions about La Cosa Nostra. We reject the government's contention that this fact prevents appellants from challenging the district court's ruling. The defendants need not show actual prejudice. *Swain v. Alabama*, 380 U.S. 202, 219 (1965). Any error which impairs the exercise of peremptory challenges is reversible error. *United States v. Turner*, 558 F.2d 535, 538 (9th Cir. 1977).

Jurors need not be totally ignorant of the facts and issues involved. *Irvin v. Dowd*, 366 U.S. 717, 722 (1960). The court in *Irvin* noted:

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict

> based on the evidence presented in court. [citations omitted]

Here, each of the jurors stated that he did not have an opinion on the guilt or innocence of the defendants, that he would keep an open mind, and that he would listen to the evidence on both sides and follow the court's instructions. They also said that they would then decide whether La Cosa Nostra exists, whether it operates in Los Angeles, and whether the defendants were members of it. On the basis of the evidence and the instructions, they would then decide whether each defendant was guilty of an offense charged in the indictment.

The trial court has broad discretion in its rulings on challenges for cause, and can only be reversed for an abuse of discretion. *Dennis v. United States*, 339 U.S. 162, 168 (1949). In *Dennis*, the Supreme Court affirmed the conviction of an admitted communist by a jury composed of government employees during a period of widespread anticommunist hysteria. Here, both sides stipulated to the jury that membership in La Cosa Nostra is not a crime. The jury was told that the government had the burden of proving that each appellant was knowingly associated with an enterprise engaged in a pattern of racketeering activity. No juror expressed an opinion before trial on whether any appellant was a member of La Cosa Nostra, or was guilty of any illegal act.

The district court did not abuse its discretion in refusing to dismiss the four jurors for cause.

AFFIRMED.

APPENDIX C.

Order.

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Dominic Phillip Brooklier, Samuel Orlando Sciortino, Louis Tom Dragna, Michael Rizzitello, and Jack Locicero, Defendants-Appellants.

Nos. 81-1045, 81-1046, 81-1047, 81-1048, 81-1049.

Filed: November 1, 1982.

Before: KENNEDY and SCHROEDER, Circuit Judges, and SOLOMON,* District Judge.

The panel as constituted in the above case has voted to deny the petitions for rehearing. Judges Kennedy and Schroeder have voted to reject the suggestions for a rehearing en banc, and Judge Solomon has recommended rejection of the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc hearing, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestions for a rehearing en banc are rejected.

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*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.